United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

76-7637

To be argued by
STEVEN J. GLASSMAN

United States Court of Appeals

For the Second Circuit

B
P/S

CHARLES D. REICH,
Plaintiff-Appellant,

v.

DOW BADISCHE COMPANY and
DOW CHEMICAL COMPANY,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES DOW BADISCHE COMPANY AND DOW CHEMICAL COMPANY

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
Attorneys for Defendants-Appellees,
Dow Badische Company and
Dow Chemical Company
425 Park Avenue
New York, New York 10022
(212) 730-8400

STEVEN J. GLASSMAN
MARK LANDAU
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7637

CHARLES D. REICH,

Plaintiff-Appellant,

v.

DOW BADISCHE COMPANY and DOW CHEMICAL COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF OF DEFENDANTS-APPELLEES, DOW BADISCHE COMPANY AND DOW CHEMICAL COMPANY

Preliminary Statement

This brief is submitted on behalf of defendants-appellees Dow Badische Company and Dow Chemical Company. Plaintiff-appellant Charles D. Reich has appealed from the Order and Judgment of the Hon. Inzer B. Wyatt, United States District Judge, Southern District of New York, entered December 14, 1976, dismissing his Complaint under the Age Discrimination in Employment Act ("ADEA"),

29 U.S.C. §621, *et seq.*, because of plaintiff-appellant's failure to satisfy the jurisdictional requirement of the timely filing of a notice of intent to sue as prescribed in 29 U.S.C. §626(d).

Issues Presented for Review

I

Did plaintiff-appellant's failure to timely file a notice of intent to sue require dismissal of the Complaint?

II

Did plaintiff-appellant's failure to timely commence a state proceeding also require dismissal of the Complaint?

Statement of the Case

On June 29, 1973, Dow Badische Company discharged plaintiff-appellant Charles D. Reich from employment (Complaint, ¶10; JA 16*). Mr. Reich had been employed at the New York office of Dow Badische Company for approximately eight years; this employment began when he was 50 years old, and the discharge took place when he was 58 (Complaint, ¶¶9, 11; JA 16). Mr. Reich filed the Complaint herein exactly three years after his discharge, on June 29, 1976 (JA 1), alleging that he had been unlawfully discharged on acount of his age (JA 2-6).

Mr. Reich's Complaint was dismissed by the District Court because notices of intent to institute a private action

* "JA" as used herein refers to the Joint Appendix on this appeal.

were not actually filed by Mr. Reich with the Department of Labor, as required by 29 U.S.C. §626(d), until early 1976 —more than two years and seven months after his discharge, and far beyond the time limitations set forth in the statute (Complaint ¶3; JA 15, 60).*

On this appeal, plaintiff-appellant attempts to thoroughly obscure the basis of the District Court's decision by avoiding even a mention of the exceedingly late dates on which he filed such notices of intent, and calling this Court's attention only to an alleged earlier oral notification which, he now argues, would satisfy the statutory requirements.

Notwithstanding the arguments of early oral notification emphasized on this appeal, the Complaint alleged, as a jurisdictional matter, as follows:

> Notice of an intent to file suit against defendant Dow Badische Company was given to the Department of Labor on February 11, 1976. Notice of an intent to file suit against defendant Dow Chemical Company was given on March 2, 1976. Plaintiff received confirmation of receipt of both notices in a letter from the Employment Standards Administration, United States Department of Labor, dated April 6, 1976. (Complaint, ¶3; JA 15).**

In response to defendants-appellees' motion to dismiss the Complaint, plaintiff submitted a lengthy Affidavit to the District Court, in which he attempted to avoid the impact

---

* As discussed at p. 7, *infra*, the statute requires that such notices be filed within 180 or 300 days of the discharge.

** Copies of these notices, which were supplied by Mr. Reich in response to a request for production of documents below, but are not contained in the Joint Appendix, are annexed hereto at pp. a-1 and a-2.

of his admittedly late filing of notices of intent to sue. Mr. Reich stated that in 1973 he made an administrative complaint to the Department of Labor (Reich Affid., ¶2; JA 26), that he told a Department of Labor official that "I would sue when I would find a lawyer." (Reich Affid., ¶4; JA 27), and that, in essence, for more than two and one-half years he did not file notices of intent to institute a private action because he hoped the Department of Labor would bring suit on his behalf (Reich Affid., ¶20; JA 30; see p. a-1, *infra*). He also described at length an apparent inability to secure competent counsel to represent him in a private action (Reich Affid., ¶¶2-19; JA 26-30).

Mr. Reich claimed that he "was not sitting on [his] hands, as far as the United States Department of Labor was concerned" and "had never had a definite statement from the United States Department of Labor that they would not pursue this case in Federal Court . . . until December 19, 1975 . . ." (Reich Affid., ¶20; JA 30). Quite to the contrary, documents produced by Mr. Reich in response to a request for production in the present case reveal that he was advised on January 23, 1975—well over a year before he finally filed his notices of intent to sue—of the Department of Labor's conclusion that there was no basis for litigation by the Department on his behalf (Glassman Affid., ¶7, Exhibit D thereto; JA 50, 54).*

* In his Affidavit in Opposition submitted to the District Court, plaintiff-appellant also attempted to divert attention from the deficiencies of his Complaint by stating that "not one official of either the Dow Chemical Company or Dow Badische Company has had the temerity upon the initial motion papers to come forth with a statement under oath that my case has no merit . . ." (Reich Affid., ¶29; JA 33). We note that, although this motion and appeal do not deal with the merits of the case, the very documents produced by plaintiff-

(footnote continued on next page)

On appeal, Mr. Reich appears to essentially abandon his effort to justify his exceedingly late filings, points to his alleged oral notification, admits that the credibility of such notification would be in issue, and contends that this introduces a question as to a material fact which, he urges, requires reversal.

Mr. Reich also now incredibly asserts in his brief on appeal that even if oral notification would not otherwise satisfy the statutory requirement here, he was led to believe that he had complied with the ADEA notice requirements. (Plaintiff-Appellant's Brief, p. 10). The record reveals precisely the contrary. Documents produced by Mr. Reich and reviewed by the District Court establish that, far from being misled as to the effectiveness of any oral statements to a Department of Labor official, or by the hope of Department of Labor action, Mr. Reich was repeatedly advised by the Department of his rights to file a private action, the time limits which he was required to meet, and the fact that the Department of Labor did not consider his prior actions as constituting a notice of intent to file suit. On three occasions, by letters of December 11, 1973, April 2, 1974, and August 13, 1974, the Department of Labor sent Mr. Reich a pamphlet summarizing the provisions of the

---

appellant herein and reproduced in the Joint Appendix reveal that the Associate Assistant Regional Director for Employment Standards advised plaintiff, on January 23, 1975, that "the solicitor's office, having considered the matter in great depth, advises us there is no basis for litigation by the Department of Labor in your behalf." (Glassman affid., ¶7, Exhibit D thereto; JA 50, 54). Mr. Reich is also fully aware of defendants-appellees' denial of his allegations on the merits, and of the basis for the Department of Labor's conclusion, following investigation, that "there is no factual basis for the allegations that the complainant Charles Reich was terminated due to his age or that age played any part in this decision." (Glassman Affid., ¶8, Exhibit E thereto; JA 50, 55-57).

ADEA or a copy of the ADEA itself, and emphasized that "there are certain requirements with specific time limits governing the circumstances under which an employee may file his own suit under the act." (Glassman Affid., ¶¶4-6 and Exhibits A-C thereto; JA 49, 51-53). And the letter which Mr. Reich received from the Department of Labor, dated April 2, 1974, specifically stated: "The fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit." (Glassman Affid., ¶5, and Exhibit B thereto; JA 49, JA 52).

Not only did Mr. Reich file his notices of intent to sue with the Department of Labor more than two years and seven months after his termination of employment but, additionally, he waited almost three years after his discharge from employment before filing, on June 24, 1976, a verified complaint ("state complaint") with the New York State Human Rights Commission, Division of Human Rights (Answers to Interrogatories 1 and 2; JA 23).* That state complaint was filed just five days prior to the filing of this Complaint in federal court. Mr. Reich thus failed to give the State Division 60 days to consider his state complaint (as required by 29 U.S.C. §633(b)) prior to filing the instant action. Further, his state complaint was filed well beyond the expiration of the state statute of limitations. Indeed, on April 6, 1977, the State Division dismissed Mr. Reich's state complaint for this very reason. (A copy of the State Division's "Determination and Order After Investigation" is reproduced at pp. a-3 and a-4, *infra.*) These facts create additional, independent bases for dismissal of this action.

---

* The Complaint herein had merely alleged that plaintiff "has sought relief through various channels of federal and state government, to no avail." (Complaint, ¶17; JA 71).

ARGUMENT

POINT I

Plaintiff-appellant's failure to timely file a notice of intent to sue requires dismissal f the Complaint.

(a) Notices of intent to sue, which were actually filed by plaintiff-appellant more than two years and seven months after his discharge from employment, were exceedingly untimely and did not comply with the statutory requirements.

The ADEA requires that, prior to the commencement of a private civil action based on age discrimination, a notice of intent to bring such an action be filed with the Secretary of Labor within a specified time period after the alleged unlawful practice occurred. Under 29 U.S.C. §626(d), the time period for such a filing is either 180 days or, if there is a state law prohibiting age discrimination in employment and authorizing a state authority to grant or seek relief, is extended from 180 days to 300 days after the alleged unlawful practice occurred.*

---

* Specifically, 29 U.S.C. §626(d) provides as follows:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of intent to file such action. Such notice shall be *filed*—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which Section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier . . . (Emphasis supplied).

Timely filing of a notice of intent to sue under Section 626(d) is a mandatory prerequisite to the institution of a private action under the ADEA. *Ott* v. *Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975); *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 633-34 (6th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485, 487 (5th Cir.), *rhrg. denied*, 498 F.2d 1402 (1974); *Brohl* v. *Singer Co.*, 407 F. Supp. 936, 938 (M.D. Fla. 1976); *see Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *cert. granted, Shell Oil Co.* v. *Dartt*, No. 76-678, 45 U.S.L.W. 3554 (Feb. 22, 1977); *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1199-1200 (5th Cir. 1975); *Davis* v. *RJR Foods, Inc.*, 420 F. Supp. 930, 932 (S.D.N.Y. 1976).

Plaintiff-appellant did not actually file the required notice of his intent to sue Dow Badische and Dow Chemical until February 11, 1976 and March 2, 1976, respectively—more than two years and seven months after his June 29, 1973 termination from employment. This is far beyond the time allowed by the statute. The Complaint was properly dismissed.

(b) Plaintiff-appellant's purported earlier oral notification cannot satisfy the jurisdictional filing requirements of the statute.

Apparently recognizing that he filed his notices of intent to sue far too late, Mr. Reich now argues that there is an issue of fact as to whether or not—prior to his exceedingly late 1976 filing of notices of intent—he had orally advised a Department of Labor official of an intent to

sue. He then argues that such oral notification should satisfy the filing requirements of the statute. In support of this attempt to salvage his action, plaintiff-appellant states that "neither the statute nor any reported case dictates that the notice must have been in writing." (Plaintiff-Appellant's Brief, p. 5). This is simply not true.

Oral notification is insufficient as a matter of law. The statute itself, 29 U.S.C. §626(d), provides that "[s]uch notice shall be filed," words whose plain meaning requires some form of writing or document which is capable of being filed. And, indeed, a number of recent decisions under the ADEA have rejected the oral notification argument raised by plaintiff-appellant here. *Hays* v. *Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Hughes* v. *Beaunit Corp.*, —— F. Supp. ——, 12 EPD ¶11, 092 (E. D. Tenn. 1976); *Berry* v. *Crocker National Bank*, —— F. Supp. ——, 13 EPD ¶11, 377 (N.D. Cal. 1976).

In *Hughes*, the Court dismissed an ADEA complaint where written notice of intent to sue was filed on the 181st day after the alleged unlawful employment practice had occurred—only one day late—and plaintiff claimed he had given the Secretary of Labor earlier oral notice of his intention. The Court held:

> This requirement was also ". . . couched in ordinary English . . . 'and' . . . Congress has evidently meant what these words ordinarily convey . . .", i.e., that the Secretary of Labor be given a written notice and not oral notice. 12 EPD ¶11, 092, at p. 5063.

Similarly in *Berry*, the Court rejected an argument that oral notification was sufficient, stating that such an argu-

ment "flies in the face of the clear language of §626(d) requiring notice to be 'filed' . . ." 13 EPD ¶11, 377 at 6252.

In *Hays,* one of the plaintiffs had allegedly given timely oral notification and prepared a written notice, but became ill and did not file it. The Court held that he had not made a " 'filing' of a notice of intent," and rejected his claim on jurisdictional grounds. 531 F.2d at 1312.

A number of cases have also clearly held that, given the Congresional intent that the administrative complaint process leading to a possible suit by the Secretary of Labor be separate and distinct from the process for filing a private action, the requirement that one file a specific notice of intent to bring a private suit is mandatory, and is not satisfied by a complaint to the Department of Labor. *Dartt* v. *Shell Oil Co., supra,* 539 F.2d at 1259; *Powell* v. *Southwestern Bell Telephone Co., supra,* 494 F.2d at 489; *Goodman* v. *Heublein, Inc.,* —— F. Supp. ——, 12 EPD ¶11, 190 (D. Conn. 1976). Such a notice of intent to sue, a copy of which is forwarded to the complainant's employer, puts the employer on notice that a private suit will be commenced, quite apart from any administrative proceedings.

Not only is the filing requirement which Congress imposed on private litigants clear on the face of the statute, but it is logical as well. If an administrative department, such as the Department of Labor, were required to notify an employer that it would be sued privately, on the basis of administrative complaints or on the basis of informal oral notifications given to Department employees or officers, and the courts were to decide jurisdictional issues based on the credibility of someone's testimony that he had once told a government employee of his intentions, the administrative and judicial processes would be severely

taxed.* Oral notification is simply inadequate where the statute requires that a notice be filed.

The argument which plaintiff-appellant raises here, in a last-ditch effort to resurrect his claim, has expectably been rejected by numerous courts faced with identical arguments regarding the meaning of the word "file" or "filed" in other statutes. And courts interpreting the filing requirements of the ADEA as requiring a writing have cited such decisions with approval. *See Hays* v. *Republic Steel Corp., supra,* 531 F.2d at 1312; *Hughes* v. *Beaunit Corp., supra,* 12 EPD ¶11, 092, at p. 5063.

In *United States* v. *Lombardo,* 241 U.S. 73, 76 (1915) (cited in *Hays* v. *Republic Steel Corp., supra*), the Supreme Court interpreted the meaning of the word "file" and spoke as follows:

> The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word 'file' is derived from the Latin word 'filum,' and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed is not complete until the document is delivered and received. 241 U.S. at 76.

In *Ritter* v. *United States,* 28 F.2d 265 (3d Cir. 1928) (cited in *Hughes* v. *Beaunit Corp., supra*), the Court dismissed

* Not only would plaintiff-appellant want the Court to rely on his own reconstruction of his purported oral notification in the face of a statute calling for a written record to obviate such a problem, but he has failed to even assert the identity of the proposed defendant in his oral notification. Thus, his affidavit seems to contemplate action against Dow Badische only (Reich Affid., ¶3; JA 27). The untimely notice of intent which Reich actually filed on February 11, 1976 named only Dow Badische (see p. a-1, *infra*), and was followed by a notice filed on March 2, 1976 naming Dow Chemical. (Complaint ¶3, JA 3; see p. a-2, *infra*).

a tax refund action where the plaintiff had made an oral application for refund, but the statute required that a claim be timely "filed" prior to the institution of any suit:

> The statute and regulations prescribed that a claim must be filed. This means a written claim, and not an oral one, because it is difficult to know just how to file an oral claim. It could not be done, unless it was reduced to writing, either by the plaintiff or some one for him. The oral claim, therefore, was in law insufficient. 28 F.2d at 267.

Ritter has been followed in other cases which have rejected oral claims where the statute required a filing. *Benenson* v. *United States,* 257 F. Supp. 101, 108 (S.D.N.Y. 1966) *aff'd,* 385 F.2d 26 (2d Cir. 1967); *Hawkins* v. *United States,* 14 F. Supp. 429, 432 (W.D. Pa. 1936). Similarly, in *In re Gubelman,* 10 F.2d 926, 929 (2d Cir. 1925), *modified on other grounds, sub nom. Latzko* v. *Equitable Trust Co.,* 275 U.S. 254 (1927), the Second Circuit cited the *Lombardo* case in interpreting the meaning of the word "file" under the bankruptcy statute:

> The word "filed" has not been defined by Congress. It has, however, a well-defined meaning. It signifies a delivery into the actual custody of the proper officer, designated by the statute, and whose duty it is to keep the records.... It carries with it the idea of permanent preservation of the thing as a public record. 10 F.2d at 929.

See also Foley v. *Mayor,* 1 App. Div. 586, 37 N.Y.S. 465 (1896) ("a notice by word of mouth cannot be filed.").*

---

* Black's Law Dictionary 755 (rev. 4th ed. 1968) defines "file" as "To lay away papers for presentation and reference . . . To deliver an instrument or other paper to the proper officer for the purpose of being kept on file by him in the proper place. . . . It carries the idea of permanent preservation as a public record." *See* 66 C.J.S. Notice §16, at 656: *"Notice to be filed.* Where the law requires a notice to be filed, the implication is that it shall be in writing, and oral notice is insufficient."

Plaintiff-appellant cites only one earlier ADEA case, *Woodford* v. *Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973), which held, in an unusual factual situation that an oral complaint to the Department of Labor would "preserve" an individual's right to file suit later. In light of the express language of the statute, *Woodford* has been specifically criticized and rejected by the courts in *Hughes* v. *Beaunit Corp., supra,* 12 EPD ¶11, 092 (E.D. Tenn. 1976); and *Berry* v. *Crocker National Bank, supra,* 13 EPD ¶11, 377, at p. 6252 (N.D. Cal. 1976). Moreover, in *Woodford,* the plaintiff was affirmatively misled by Department of Labor officials who told her that it was unnecessary for her to file a written complaint. 369 F. Supp. at 914; *see Berry* v. *Crocker National Bank, supra,* 13 EPD ¶11, 377 at p. 6252. Here, by comparison, plaintiff was specifically advised by the Department of Labor, by letter dated April 2, 1974, that the information he had submitted was not considered a notice of intent to sue, and was told about the proper filing requirements:

> . . . to avoid any misunderstanding, your attention is again called to page 4 of the enclosed pamphlet. As you will note, there are certain requirements with specific time limits governing the circumstances under which an employee may file his own suit. *The fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit.* We do not, of course, encourage or discourage such suits. This is entirely up to you. (Glassman Affid., ¶5 and Exhibit B thereto; JA 49, JA 52). (Emphasis supplied).

In *Hiscott* v. *General Electric Co., supra,* 521 F.2d at 634, a similar letter from the Department of Labor was held to

conclusively bar reliance on an administrative complaint as a substitute for a notice of intent to sue. Since Mr. Reich was informed that, whatever the nature of the information he had given to the Department, it was not a notice of intent to sue, and he still failed to file any such notice for almost two more years, he has no one but himself to fault.

Given the clear requirements of the statute that notices of intent to sue be timely filed, and especially in view of the Department of Labor's advice that the information he had supplied did not constitute a notice of intent to sue, Mr. Reich's attempted reliance on a purported oral notification must be rejected. He must live with the consequences of his own late filings in 1976, and the Complaint must therefore be dismissed.

(c) The ADEA timeliness requirements are jurisdictional, and in any case cannot be equitably tolled given the circumstances of this case.

Mr. Reich also appears to argue that, because of the liberal interpretation normally given civil rights statutes, and because of his status as a layman and difficulty in obtaining an attorney to represent him, the time requirements of Section 626(d) of the ADEA should be equitably tolled, hopefully rendering his 1976 notices of intent to sue timely. Although this argument consumed most of the attention of the parties below, Mr. Reich has de-emphasized this point on appeal for good reason: it is legally incorrect and, in any event, the circumstances here do not warrant equitable relief.

Most of the courts which have considered the question have held that the timely filing requirement for a notice

of intent to sue is jurisdictional in the strictest sense, and should not be subject to equitable tolling. *Ott* v. *Midland-Ross Corp., supra,* 523 F.2d 1367, 1370 (6th Cir. 1975); *Hiscott* v. *General Electric Co., supra,* 521 F.2d 632, 633-34 (6th Cir. 1975); *Powell* v. *Southwestern Bell Telephone Co., supra,* 494 F.2d 485, 487-88 (5th Cir.), *rhrg. denied,* 498 F.2d 1402 (1974); *Brohl* v. *Singer Co., supra,* 407 F. Supp. 936, 938 (M.D. Fla. 1976). *See also DeMatteis* v. *Eastman Kodak Co.,* 511 F.2d 306, 309 (2d Cir.), *modified,* 520 F.2d 409 (1975) (Title VII time limit jurisdictional). *But see, Dartt* v. *Shell Oil Co., supra,* 539 F.2d at 1259-60, *cert. granted,* 45 U.S.L.W. 3554 (Feb. 22, 1977).

A review of the legislative history buttresses the view that the timely filing of the notice of intent to sue is jurisdictional, and cannot be tolled. *See Hiscott* v. *General Electric Co., supra,* 521 F.2d at 633-34; n.2, 3, citing H. Rep. No. 805, 1967 U.S. Code Cong. & Admin. News, p. 2223; S. Rep. No. 723, 90th Cong. (1967), and the extensive review of the legislative history in *Powell* v. *Southwestern Bell Telephone Co., supra,* 494 F.2d at 487-88; *see also Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc., supra,* 515 F.2d at 1199-1200.

Regardless, plaintiff-appellant here has not presented any equitable considerations which would justify tolling the limitation period at all, let alone for the two years and seven months until he finally filed such notices (Complaint, ¶3; JA 3; see notices reproduced at pp. a-1, a-2, *infra.*). Those cases which have allowed an equitable tolling of the time limits still required that an actual notice of intent be filed within 180 days of the time that a plaintiff was put on notice of the filing requirement. The record here demonstrates that Mr. Reich was fully aware of the filing and time

requirements of the ADEA, but nevertheless failed to satisfy them. He truly has no one to blame but himself.

Plaintiff-appellant attempts to excuse his admittedly late *filing* of notices of intent to file suit on the grounds that, for more than two and one-half years, he hoped the Department of Labor would bring suit on his behalf (Reich Affid., ¶20; JA 30; see p. a-1, *infra*), and because he was allegedly unable to secure competent counsel to represent him in a private action (Reich Affid., ¶¶2-19; JA 26-30).*

In fact, far from being misled by the hope of Department of Labor action, Mr. Reich was repeatedly advised by the Department of his rights to file a private action, and the time limits which he was required to meet. By letter of April 2, 1974, portions of which are quoted at p. 13, *supra,* Mr. Reich was not only specifically advised that the information he had submitted did not constitute a notice of intent to file his own suit, but in addition was furnished a pamphlet summarizing the ADEA provisions, and had his attention specifically called to the

* Although the relevancy of Reich's difficulties in obtaining counsel is doubtful, they reveal the following: As early as July 18, 1973, Mr. Reich consulted with counsel about instituting legal proceedings against Dow Badische under the federal age discrimination in employment statutes (Reich Affid., ¶3, Exhibit A thereto; JA 27, 34). His affidavit describes a number of subsequent contacts with attorneys, including a meeting on March 11, 1975 with Arthur Olick of Anderson, Russell, Kill & Olick, who, although admitted to have the expertise to handle such a case, would not take it on a contingent fee basis (Reich Affid., ¶¶9-10; JA 28), and a bar association referral to an attorney who Mr. Reich saw on April 17, 1975, but who then told plaintiff that he "did not want to handle the case" (Reich Affid., ¶¶13-15; JA 29). Mr. Reich nevertheless filed his notices of intent, on February 11 and March 2, 1976, without the assistance of counsel; he apparently was only able to retain counsel in the late Spring of 1976 (Complaint, ¶3, Reich Affid., ¶19; JA 3, 30).

time limits in the ADEA. (Glassman Affid., ¶5, Exhibit B thereto; JA 49, 52). Mr. Reich had received another letter and another copy of the ADEA pamphlet on December 11, 1973 (Glassman Affid., ¶4, Exhibit A thereto; JA 49, 51). And on August 13, 1974, Mr. Reich received yet a third letter emphasizing the requirements and time limits governing the filing of a private action and this time enclosing a copy of the ADEA itself. (Glassman Affid., ¶6, Exhibit C thereto; JA 49, 53).

In *Dartt* v. *Shell Oil Co., supra,* in which a petition for certiorari has been granted, the Tenth Circuit held that the timely filing requirement of Section 626(d) of the ADEA was satisfied where a notice of intent to sue was filed promptly after plaintiff received actual notice of the 180-day requirement, in a letter from the Department of Labor which discussed her private right to sue and enclosed a pamphlet detailing the ADEA provisions. By comparison, plaintiff-appellant Reich received just such notice from the Department of Labor on at least three separate occasions—December 11, 1973, April 2, 1974 and August 13, 1974—and still did not file until February 11 and March 2, 1976.*

In *Powell* v. *Southwestern Bell Telephone Co., supra,* 494 F.2d at 486-90, the Court, while holding that the 180-day time limit was jurisdictional, also found that plaintiff's

* Several other cases cited by plaintiff-appellant also support the equitable tolling theory where, unlike Mr. Reich, the plaintiff was unaware of the ADEA's requirements. *Skoglund* v. *Singer,* 403 F. Supp. 797 (D.N.H. 1975); *Bishop* v. *Jelleff Associates,* 398 F. Supp. 579 (D.D.C. 1974). These cases are not only distinguishable on the facts, but have also been criticized for their holdings. *See Hiscott* v. *General Electric Co., supra,* 521 F.2d at 634.

failure to file promptly after receiving letters from the Department of Labor advising her of the statutory time limits precluded her from obtaining any equitable relief from strict enforcement of those time limits.

Here, Mr. Reich unquestionably knew of the time limitations in the ADEA. The fact that, for nearly three years, competent counsel with whom he consulted would not accept his case does not vitiate his knowledge of the statutory requirements. With such knowledge, and repeated admonition from the Department of Labor, Mr. Reich nevertheless failed to file a timely notice of intent to file a private action, and instead persisted in his hope that the Department of Labor would obtain relief on his behalf. Even after the Department of Labor rejected his claims on the merits and advised him of its conclusion that there was no basis for the Department to litigate on his behalf, Mr. Reich failed to take prompt action. Mr. Reich's Complaint must be dismissed. Defendants should not be required to endure lengthy proceedings on the merits of a claim which they thought was resolved long ago.*

---

* As noted at p. 4 fn.*, *supra*, plaintiff-appellant was advised, in January 1975, that the Department of Labor, following investigation of an administrative complaint by Mr. Reich, found there was no basis for Mr. Reich's claims, and was also advised of the ADEA's requirements. The Department of Labor's conclusion that there is no factual basis for Mr. Reich's allegation that he was terminated because of age, or that age played any role in the Company's decision, is detailed in a Department of Labor Memorandum produced by plaintiff-appellant in response to a request for production of documents (Glassman Affid., ¶¶7-8 and Exhibits D and E thereto; JA 50, 54, 55-57).

POINT II

Plaintiff's failure to timely commence a state proceeding also requires dismissal of the complaint.

Plaintiff-appellant has slept not only on his federal rights, but on his state rights as well. The federal regulatory scheme requires him to seek appropriate state relief before instituting a federal action, and his inaction in this regard mandates dismissal of his federal claims.*

Section 14(b) of the ADEA, 29 U.S.C. §633(b), bars federal suits under the ADEA unless the plaintiff has first commenced state proceedings and allowed the state a "threshhold period" of 60 days to attempt to resolve the controversy.** *Goger* v. *H. K. Porter Co.*, 492 F.2d 13, 15-16 (3rd Cir. 1974); *Curry* v. *Continental Air Lines*, 513 F.2d 691 (9th Cir. 1975); *Davis* v. *RJR Foods, Inc., supra*, 420 F. Supp. 930, 933 (S.D.N.Y. 1976); *Gabriele* v. *Chrysler Corp.*, 416 F. Supp. 636 (E.D. Mich. 1976); *see Rogers* v. *Exxon Research & Engineering Co.*, —— F.2d —— 13 EPD ¶11, 466, at pp. 6621-22 (3rd Cir. 1977); *Pacific Maritime Assoc.* v. *Quinn*, 465 F.2d 108, 110 (9th Cir. 1972) (analagous Title VII provision); *Crosslin* v. *Mountain States Tel. & Tel.* 422 F.2d 1028, 1030-31 (9th Cir. 1970), *vacated and*

* This issue was thoroughly briefed before the District Court. Although Judge Wyatt found it unnecessary to reach the issue since he dismissed the action for failure to comply with 29 U.S.C. §626(d), this alternative ground for dismissal of the Complaint urged by defendants-appellants is properly before this Court on appeal. *See, e.g. Dandridge* v. *Williams*, 397 U.S. 471, 475 n. 6 (1970); *Blanton* v. *State University of New York*, 489 F.2d 377, 382 n. 7 (2d Cir. 1973).

** The ADEA does not require that state proceedings be completed (in effect giving a plaintiff a choice of remedies if a state agency should be slow to act).

remanded, 400 U.S. 1004 (1971) (Title VII); *see also Love* v. *Pullman,* 404 U.S. 522 (1972).*

By its terms §633(b) is applicable wherever a state has a law prohibiting age discrimination and an agency authorized to grant or seek relief.** The New York Human Rights Law, contained in New York Executive Law, ¶290, *et seq.,* is such a statute. Section 296, subd. 1, specifically prohibits age discrimination in employment. Section 293 creates the Human Rights Division, and Section 295

---

* *Compare, Skoglund* v. *Singer Co.,* 403 F. Supp. 797 (D. N.H. 1975), relied on by plaintiff in the District Court. In that case, plaintiff had filed a state complaint and allowed the state (Massachusetts) far more than the required 60 days to consider his claim before filing his federal action. However, he had not strictly complied with a state statute of limitations which had not yet been interpreted. Further, there was no indication that the plaintiff had knowingly refused to timely avail himself of his state remedies. 403 F. Supp. at 802, n. 5. Under those circumstances, the Court found that the federal action was not barred. Although we submit that *Skoglund* dictum regarding the non-jurisdictional nature of §633(b) of the ADEA was erroneous, we note that plaintiff Reich here neither allowed the State of New York 60 days to consider his state complaint, as did the plaintiff in *Skoglund,* nor was Mr. Reich unaware of the provisions of §633(b) of the ADEA.

** 29 U.S.C. §633(b) provides as follows:

> In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be brought under Section 626 of this title before the expiration of 60 days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* that such 60-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

charges the Division with enforcement of the rights created under the Human Rights Law. New York is therefore a deferral state under Section 633(b) of the ADEA, requiring that state proceedings be commenced 60 days before a federal action may be filed. *See Davis* v. *RJR Foods, Inc., supra,* 420 F. Supp. at 933.

Plaintiff-appellant has failed to comply with this requirement, and the Complaint herein must accordingly be dismissed. As revealed in his Answers to Interrogatories filed below, no written complaint was filed with the State Division of Human Rights until June 24, 1976—a mere five days before plaintiff-appellant brought his federal action (JA 23; see p. a-3, *infra*). We note that New York Executive Law §297, subd. 1, explicitly requires a written and signed complaint to commence state proceedings, obviating any eleventh-hour contention that Mr. Reich may have "commenced" state proceedings in some other manner.

The Complaint here was filed in federal court on June 29, 1976 (JA 1), exactly three years after Mr. Reich's discharge, and on the last possible date before expiration of the federal statute of limitations.* Plaintiff is therefore conclusively barred from bringing his claim in federal court, despite the fact that 60 days have now elapsed since he commenced state proceedings. Since the instant action must be dismissed, leave to file a new action would be unavailing because any such action is now barred by the federal statute of limitations.

* 29 U.S.C. §626(e) applies 29 U.S.C. §255 to the ADEA and provides generally for a two-year statute of limitations, with a three-year provision for willful violations.

Nor can plaintiff-appellant claim that late filing of his state complaint tolls the federal statute of limitations. By specific provision in the ADEA, timely commencement of a state action extends the time within which a federal notice of intent to sue may be filed with the Secretary of Labor from 180 to 300 days from the date of the unlawful discrimination. 29 U.S.C. §626(d). The commencement of a state action and the 60-day waiting period under §633(b) does not, however, extend the overall federal statute of limitations. *Fitzgerald* v. *New England T & T Co.*, 416 F. Supp. 617, 619 (D. Mass. 1976), *vacated on other grounds*, —— F. Supp. ——, Civil Action No. 75-1598-S (D. Mass. Nov. 4, 1976); *see Ott* v. *Midland-Ross Corp., supra,* 523 F.2d at 1369; *see also Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 821-26 (7th Cir. 1972) (Title VII limitations).

Further, plaintiff here filed his state complaint well after expiration of the one-year New York statute of limitations provided in New York Executive Law, §297, subd. 5. *See Lanzer* v. *Fairchild Publications,* 46 App. Div.2d 644, 360 N.Y.S.2d 437 (1st Dept. 1974). Indeed, on April 6, 1977, the State Division of Human Rights issued a "Determination and Order After Investigation" dismissing Mr. Reich's state complaint for this very reason. Mr. Reich has therefore frustrated any meaningful resort to state remedies as contemplated by the ADEA. This alone requires dismissal of the federal action. *Gabriele* v. *Chrysler Corp., supra,* 416 F. Supp. 666; *Acford* v. *Exxon,* —— F. Supp. ——, 12 FEP Cases 1500, 1501-02 (D. Conn. 1975). *See Dubois* v. *Packard Bell Corp.*, 470 F.2d 973, 975 (10th Cir. 1972) (Title VII limitations); *see also Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1222, 1233 (8th Cir. 1975) (Title VII case;

regardless of state limitations, state action must be commenced within 180 days of discriminatory act).

Given plaintiff-appellant's failure to afford the state 60 days to consider his state complaint before filing his federal action, and the expiration of the federal statute of limitations, let alone the failure to comply with the state statute of limitations, his federal Complaint must be dismissed.

Conclusion

For all of the foregoing reasons, the judgment of the District Court should be affirmed and the Complaint herein dismissed.

Dated: New York, New York
April 11, 1977

Respectfully submitted,

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
Attorneys for Defendants-Appellees,
Dow Badische Company and
Dow Chemical Company
425 Park Avenue
New York, New York 10022
(212) 759-8400

STEVEN J. GLASSMAN
MARK LANDAU
Of Counsel

a - 1

Charles D. Reich
Horsepound Road, RFD #8
Carmel, New York 10512

February 11, 1976

Mr. Francis V. La Ruffa
Regional Director
U.S. Department of Labor
Office of the Solicitor
1515 Broadway
New York, N.Y. 10036

Dear Mr. LaRuffa:

I understand that you and the Labor Department do not intend to take any further action on my behalf since our meeting in your office December 19, 1975 concerning my charge of willful violation of the Federal Age Discrimination in Employment Act of 1967 by the Dow Badische Company.

I did not think I was wasting your time in that meeting with you on December 19. There is in my opinion additional information that Dow Badische Company has and I asked for it in my letter to you dated December 26, 1975. So far I have had no reply to that letter. You and the Labor Department have the authority to get the information I requested in my letter to you dated December 26.

I take your refusal to prosecute Dow Badische Company at our meeting of December 19 as the Labor Department final decision not to pursue my case against Dow Badische Co.

Therefore I am giving you notice here that I intend to sue Dow Badische Company in my own right.

Yours very truly,

Charles D. Reich

Charles D. Reich

a - 2

Charles D. K[illegible]
[illegible]
RFD #8
Carmel, N.Y. 10512
March 2, 1976

Frank K. Mennerich
Wage + Hour Division
U.S. Dept of Labor
1515 Broadway
New York, N.Y.

In addition to my letter to you Dow Badische Co as per copy of letter 2/11/76 to Mr. Francis V. LaRuffa & his reply 2/18/76, I of course plan to sue Dow Chemical Company. Dow Chemical owns 50% of Dow Badische Co.

Dow Chemical Co is in Midland Michigan. They have a branch office at 45 Rockefeller Plaza, N.Y. N.Y.

Yours truly,
Charles D. K[illegible]

NEW YORK STATE : EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

COMPLAINANT

CHARLES D. REICH

VS.

DOW BADISCHE COMPANY, INC. AND DOW CHEMICAL COMPANY, INC.

RESPONDENT

Case Nos. Ia-E-A-3633-76
E-A-43413-76

DETERMINATION AND ORDER AFTER INVESTIGATION

On June 24, 1976, Charles D. Reich filed a verified complaint with the State Division of Human Rights charging the above-named respondent (s) with an unlawful discriminatory practice relating to Employment because of age in violation of the Human Rights Law of the State of New York.

Pursuant to Section 297.2 of the Law, the State Division of Human Rights hereby determines that it does not have jurisdiction in this matter for the following reason:

The alleged unlawful discriminatory practice or act complained of occurred more than one year preceding the date of filing the complaint herein. Section 297.5 of the Human Rights Law sets forth that any complaint filed pursuant to the Human Rights Law must be so filed within one year of the alleged unlawful discriminatory practice.

This complaint is therefore ordered dismissed, and the file is closed.

THE COMPLAINANT OR ANY PARTY TO THE PROCEEDING BEFORE THE DIVISION MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD, TWO WORLD TRADE CENTER 82ND FLOOR, NEW YORK, NEW YORK 10047, BY FILING A NOTICE OF APPEAL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF THE SERVICE OF THIS ORDER.

DATED:
APR 6 1977

STATE DIVISION OF HUMAN RIGHTS

By _____
GEORGE C. FINDLAY
REGIONAL DIRECTOR

TO: Charles D. Reich
c/o Coles & Weiner
1775 Broadway
New York, N. Y. 10019

Harold Weiner, Esq.
Coles & Weiner
Attorneys at Law
1775 Broadway
New York, N. Y. 10019

Steven J. Glassman
Mark Landau, Of Counsel
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, N. Y. 10022

Affidavit of Service by Mail

In re:
Charles D. Reich v. Dow Badische Company and Dow Chemical Company

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on APR 11 1977, 197 , he served 2 copies of the within Brief

in the above-named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Coles, Weiner, Tesser, P.C.
1775 Broadway
New York, N.Y.
(Attorneys for Plaintiff-Appellant)
ATT: Louis Tesser,Esq.

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 14th day of April, 1977

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1979

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(6038)